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**IN THE
COURT OF APPEALS OF INDIANA**

TERRANCE ANDERSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A05-0606-CR-325

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0506-MR-101683

February 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Terrance Anderson appeals his convictions for Murder,¹ a felony, and Carrying a Handgun Without a License,² a class A misdemeanor. Specifically, Anderson argues that his convictions must be reversed because the prosecutor committed misconduct during his opening statement, that the trial court abused its discretion in granting the State’s motion to amend the charging information to add an additional count of murder and in denying his motion to sever the charges, and that certain evidence was improperly admitted in violation of Indiana Evidence Rule 404(b). Finding no error, we affirm the judgment of the trial court.

FACTS

Sometime during the evening of June 9, 2005, Carolyn Maclin, her daughter—Starika Williams—and Williams’s young child were sitting on the front porch of their home at 943 North Dearborn in Indianapolis. A friend, Thomas Edmondson, known to Maclin by the nickname of “T,” arrived at the house because Maclin’s niece was going to meet him there to braid his hair. Next door, at 939 North Dearborn Street, Toni Ebert and her housemates, Desca “Dee” McDowell and Andre “Dre” Turner, were sitting on their porch. At some point, Anderson, who went by the nickname of “Mob,” came down the street shouting “I’m 10th Street. This is my neighborhood.” Tr. p. 139, 192.

Edmondson began walking toward Maclin’s house and saw Anderson standing on the sidewalk. Anderson immediately drew a handgun and fired at Edmondson several times. Thereafter, Maclin and Williams ran into their house. They heard a knock on the

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-47-2-1.

door and at least three more shots. Williams called 911, and McDowell, Ebert, and Turner all retreated into their house. After the police arrived, Maclin and Williams saw Edmondson lying on their porch. Edmondson was subsequently pronounced dead as a result of multiple gunshot wounds. A number of 9 mm casings and spent bullets were found at the scene. Most of the neighbors were able to identify Anderson as the shooter.

After the shooting, Anderson retreated to the house across the street at 947 North Dearborn. At some point, Anderson went to McDowell's residence and told Turner that he "didn't see nothin,' right?" Id. at 241. Anderson also told Turner to "keep his mouth shut." Id.

During the investigation of Edmondson's murder that commenced immediately after the shooting, police officers executed a search warrant at 947 Dearborn. At that time, an individual identified as Kerry Burt was transported to the police department for questioning as a possible witness to Edmondson's murder. On June 10, 2005, Indianapolis police officers were dispatched to an alley near New York Street and discovered that Burt had been shot in the cheek. Burt subsequently died from that wound, and the police recovered a 9 mm casing from the scene.

Later that same day, Anderson went to Franklin Davis's residence. Anderson asked Davis to drive him to an area near New York Street. When they arrived, Anderson exited the vehicle and began firing a 9 mm handgun into a crowd of people. As a result of this incident, an individual identified as Tyric Rudolph was shot and killed. Anderson jumped in the vehicle and ordered Davis to drive him back to the residence. Shortly thereafter, the police arrived and arrested Anderson. The police discovered a 9 mm

handgun near Davis's vehicle. Also found in the backseat of Davis's vehicle were a camouflage shirt and hat that Anderson had been wearing.

When officials at the Indianapolis Police Department Crime Lab tested the handgun, it was determined that the bullets removed from Edmondson's body had been fired by the same gun that Anderson had possessed. It was also established that bullet casings found close to Burt's body were from the same weapon.

On June 15, 2005, Anderson was charged with Edmondson's murder and with carrying a handgun without a license. Thereafter, on September 22, 2005, the State amended the charging information, adding a count for Burt's murder. The State then filed a motion for the joinder of the murders of Burt and Edmondson with the murder of Rudolph. The State alleged that the crimes were all committed within a twenty-four hour period, in the same seven-block area, and that witnesses in two of the murders had identified Anderson as the shooter. The State also pointed out that the killings were committed with the same weapon, and that Burt had been a potential witness to Edmondson's murder.

Anderson objected to the joinder of the cases and to the joinder of Burt's murder with that of Edmondson. Consequently, Anderson filed a motion to sever the offenses. The trial court denied the State's motion to join the count alleging the commission of Rudolph's murder with the other murder counts. The trial court also denied Anderson's motion to sever the count that alleged Burt's murder. Finally, it was determined that the State could present evidence at trial establishing Anderson's possession of the weapon at the time of the shootings.

Prior to trial, both parties filed motions in limine. The trial court granted Anderson's motion in limine that precluded the State from referring to Anderson as an "urban terrorist" or using the word "terrorist." Id. at 66-67. Anderson renewed his objections to the joinder of offenses regarding the Edmondson and Burt murders. He also challenged the admissibility of evidence regarding his possession of the handgun at the time of the shootings because such evidence allegedly violated the provisions of Indiana Evidence Rule 404(b).

When Anderson's jury trial for the murders of Edmondson and Burt commenced on April 17, 2006, the prosecutor made the following comment during his opening statement: "Well, this case is about the terror that was inflicted on a neighborhood in our own backyard, literally for some people. Terrance Anderson started inflicting terror on June 9, 2005." Id. at 94. Anderson objected to the use of the word "terror," and the trial court admonished the jury as follows:

Ladies and gentlemen, the Court's going to admonish you that what the attorneys say is not evidence. This is the opening statement where the – each attorney is going to be allowed to paraphrase to you what they believe the evidence will be.

Id. at 95. Anderson made no further objection, did not move for a mistrial, and the prosecutor continued his opening statement without using the word "terror." Id. at 95-100. Following the presentation of evidence, Anderson was found guilty of Edmondson's murder and carrying a handgun without a license, and acquitted of Burt's murder. Anderson now appeals.

DISCUSSION AND DECISION

I. Prosecutorial Misconduct

Anderson first contends that his convictions must be set aside because the prosecutor committed misconduct when he used the word “terror” during his opening statement at trial. In essence, Anderson contends that the prosecutor’s use of this word was so “emotional and prejudicial” that a mistrial was warranted. Appellant’s Br. p. 6.

In resolving this issue, we first note that reversal of a conviction based on a claim of prosecutorial misconduct requires a determination that the misconduct had a probable persuasive effect on the jury’s decision. Rodriguez v. State, 795 N.E.2d 1054, 1058 (Ind. Ct. App. 2003). When reviewing a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct and then consider whether, under all of the circumstances, the prosecutor’s misconduct placed the defendant in a position of grave peril to which he or she should not have been subjected. Id. “This inquiry depends upon an analysis of the probable persuasive effect any misconduct had on the jury’s decision, and whether the alleged misconduct was repeated such that it appears that the prosecutor engaged in a deliberate attempt to improperly prejudice the defendant.” Id. at 1059.

We also note that a mistrial is an extreme remedy that is warranted only when less severe sanctions will not satisfactorily correct the error. Id. A decision to deny a motion for a mistrial is within the trial court’s discretion. Id. However, to preserve a claim of prosecutorial misconduct, a defendant must not only object to the alleged misconduct but must also request an admonishment and move for a mistrial if he believed the admonition did not remove any prejudicial effect. Cowan v. State, 783 N.E.12d 1270, 1277 (Ind. Ct. App. 2003).

In this case, although Anderson objected to the prosecutor's statements, he failed to request a mistrial after the trial court issued the admonishment. Hence, Anderson has waived his claim of prosecutorial misconduct. Id. Waiver notwithstanding, it is apparent that the prosecutor's comments were merely an attempt to advise the jury as to what the State's evidence would show. Additionally, the trial court's order only precluded the prosecutor from referring to Anderson as an "urban terrorist" or from using the word "terrorism" during the trial. Tr. p. 66-67. In light of these circumstances, we cannot say that the prosecutor engaged in misconduct. For these reasons, Anderson's claim fails.

II. Joinder of Offenses and Denial of Motion for Severance

Anderson next contends that the trial court abused its discretion in joining the murder counts and that it erred in denying his motion for severance. More specifically, Anderson claims that the trial court's refusal to sever the counts regarding the murders of Edmondson and Burt "permitted highly prejudicial cumulative evidence to come before the jury." Appellant's Br. p. 5.

With regard to joinder of offenses, Indiana Code section 35-34-1-9 provides that

(a) Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

- (1) are of the same or similar character, even if not part of a single scheme or plan; or
- (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Although Anderson makes no specific argument on appeal with regard to the trial court's decision to join the offenses, the evidence showed that the offenses consisted of a series of acts connected together by a motive or plan. It was further established that the

same gun was used to kill both Edmondson and Burt. Tr. p. 682-90. Moreover, Anderson was found in possession of that weapon. Hence, the evidence regarding the murders connected Anderson to the gun, and the gun connected Anderson to both murders. Thus, the trial court did not err in joining the offenses.

With regard to a defendant's motion to sever the charges, Indiana Code section 35-34-1-11(a) states:

(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

In construing the above, our Supreme Court has determined that a defendant has an automatic right of severance if the charges are joined solely because they are of the same or similar character. Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000). Where there is no automatic right of severance, the decision whether to grant a motion to sever is within the trial court's discretion and is reviewed only for an abuse of discretion. Id. In determining whether to grant a motion to sever, the trial court must consider the elements of the statute set forth above: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. I. C. § 35-34-1-11(a); see

also Waldon v. State, 829 N.E.2d 168, 173 (Ind. Ct. App. 2005), trans. denied. We will not reverse and order new, separate trials unless the defendant establishes that “in light of what actually occurred at trial, the denial of a separate trial subjected him to such prejudice that the trial court abused its discretion in refusing to grant” the motion to sever. Brown v. State, 650 N.E.2d 304, 306 (Ind. 1995).

In this case, the evidence showed that Anderson was not entitled to severance as a matter of right. The count alleging Burt’s murder was not joined solely because it was of the same or similar character as the murder of Edmondson. Indeed, the ballistics evidence connected the two crimes, and it was established that the two offenses were representative of a single plan or connected series of acts. In essence, as the trial court found, multiple offenses were charged based on a series of acts connected together that showed the identity of the killer and a motive for Burt’s murder. Appellant’s App. p. 144. Moreover, Anderson has made no showing that the evidence involving the two crimes was particularly complex or difficult to follow. Indeed, the circumstances here were not such that severance was necessary for a fair determination of Anderson’s guilt as to each offense. To the contrary, when considering the importance of the ballistics connection between the two murders, a fair determination with respect to these offenses might have been severely hindered had they not been joined. Finally, Anderson cannot establish that he was prejudiced by the joinder of the counts, inasmuch as he was ultimately acquitted of Burt’s murder. Thus, we conclude that the trial court properly denied Anderson’s motion for severance.

III. Indiana Evidence Rule 404(b)

Finally, Anderson argues that the trial court improperly permitted the State to introduce testimony by various witnesses that he had been in possession of the gun that was used to kill Edmondson. More specifically, Anderson contends that such testimony was irrelevant to the murders and was “solely provided to bang the drum as to how much Mr. Anderson was around criminal activity.” Appellant’s Br. p. 12. Thus, Anderson claims that the admission of this evidence was so prejudicial that his convictions must be reversed.

In considering this claim, we initially observe that the decision to admit or exclude evidence is within the trial court’s sound discretion and is afforded great deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). The admission or exclusion of evidence generally will not be reversed on appeal absent a manifest abuse of discretion that results in the denial of a fair trial. Zawacki v. State, 753 N.E.2d 100, 102 (Ind. Ct. App. 2001). An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

Additionally, Indiana Evidence Rule 404(b) provides that

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The rationale behind this rule is that the jury is precluded from making the forbidden inference that the defendant had a criminal propensity and therefore engaged in the charged conduct. Monegan v. State, 721 N.E.2d 243, 248 (Ind.1999). When a defendant objects to the admission of evidence on the grounds that it violates Evidence Rule 404(b), we: (1) determine whether evidence of prior bad acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of such evidence against its prejudicial effect. Id. This court has recently determined that admitting evidence of motive surrounding a killing does not run afoul of Indiana Evidence Rule 404(b). Cox v. State, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006); see also Herrera v. State, 710 N.E.2d 931, 936-37 (Ind. Ct. App. 1999) (holding that evidence of a murder which was the subject of another prosecution against the defendant was relevant to explain his motive in the current trial for conspiring to murder witnesses who were testifying against him in the prior case).

In this case, the State's evidence established that the killing of Burt was premised upon Anderson's belief that Burt had implicated him in Edmondson's murder. Tr. p. 6-10. The evidence further showed that Anderson had possessed the weapon that was used in both murders. Id. at 683-90. The testimony of several witnesses placed the murder weapon in Anderson's possession, thus demonstrating that he possessed the weapon on the same date as the murder of Edmondson. Id. at 34-39, 45, 532-34, 560, 570, 581, 590, 607. In our view, this evidence was proper to establish the identity of Burt's killer, as there were no eyewitnesses to that crime.

Finally, we note that the evidence establishing Anderson's possession of the murder weapon was probative, especially in light of the forensic evidence that linked the weapon to the bullets that were removed from Edmondson and the casings found near Burt. Id. at 683-90. Moreover, we agree with the trial court's determination that the prejudicial impact of this evidence did not outweigh its probative value. Thus, Anderson's claim fails.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.